charges against one of their licentiates, Ward M. Whitten, who advertised "for sale complete glasses containing single vision lenses and including frames and examination for seven and 50/100 ($7.50) dollars," but "refused to sell" the same for that price "to persons answering that advertisement."

Another most vital point in this decision is that boards such as the Optometry, Medical, and others, have the right to hold hearings and revoke licenses.

We believe this important decision is worthy of publication in CALIFORNIA AND WESTERN MEDICINE.

Very truly yours,

C. B. PINKHAM, M. D.,
Secretary-Treasurer.

* * *

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Bank

FILED March 16, 1937
B. GRANT TAYLOR, Clerk
By J.
S. F. Deputy

WARD M. WHITTEN,
Plaintiff and Respondent,

vs.

CALIFORNIA STATE BOARD OF OPTOMETRY,
Defendant and Appellant.

This case was transferred to this court after decision by the District Court of Appeal, Second Appellate District, Division Two, in order that we might give further consideration to the propriety of the issuance of the writ of prohibition to restrain the respondent board from taking further action in proceedings to revoke the license of Ward M. Whitten for the making of untrue statements in his advertisement in violation of the Optometry Law (Stats. 1913, p. 1097). The action was commenced in the superior court and the peremptory writ of prohibition was ordered to issue. The Board prosecutes this appeal therefrom.

The office of the writ of prohibition is limited by the constitution to the restraint of a threatened exercise of judicial power in excess of jurisdiction and it does not lie to an officer or board exercising purely ministerial functions. (*Cameron* vs. *Kenfield,* 57 Cal. 550; *Baines* vs. *Zemansky,* 176 Cal. 369; *Santini* vs. *Justice's Court,* 218 Cal. 671). The Optometry Law provides for a State Board of Examiners in Optometry having statewide jurisdiction over the practice of optometry. Hence the case comes squarely within the rule, recently reiterated in the case of *Standard Oil Company of California* vs. *State Board of Equalization,* 92 Cal., December 7, that, in the absence of a constitutional grant of judicial power a state board cannot exercise judicial functions and the legislature is powerless to confer such power upon it. Hence the writ of prohibition is inappropriate. The fact that the Optometry Law fails to provide a method of review, perhaps by trial de novo in the superior court, is a matter for the consideration of the legislature.

The cases of *Millsap* vs. *Alderson,* 63 Cal. App. 518, and *Crisso* vs. *Board of Medical Examiners,* 95 Cal. App. 385, can no longer be considered as establishing that the legislature cannot confer upon the person deprived of a license or privilege the right to have his cause heard by way of a statutory review or trial de novo before the superior or municipal court. The distinction between the absence of authority in the legislature to enlarge or decrease the superior court's jurisdiction and its power to create or diminish rights, which, in effect, creates new or limits old causes of action, is well drawn in *Spreckels* vs. *Hawaiian Com. Company,* 177 Cal. 377, 381. See also *Wright* vs. *Superior Court,* 139 Cal. 469, and *Reclamation District* vs. *Superior Court,* 171 Cal. 672, 681.

However, it is suggested that the line of cases exemplified by *Suckow* vs. *Alderson,* 182 Cal. 247, and *State Board of Chiropractic Examiners* vs. *Superior Court,* 201 Cal. 108, should govern the instant case rather than *Standard Oil Company of California* vs. *State Board of Equalization,* supra. We are unable to find any substantial difference between the functions exercised. While it is true that in the authorities mentioned it is held that the writ of certiorari would lie to review the wrongful revocation of a license of a physician and surgeon on the theory that the medical board was exercising a quasi judicial function, we think that the sounder conclusion, in view of changing and increasing governmental activities, is that such boards are actually engaged in enforcing administrative determinations. Agencies engaged in making administrative determinations, unlike courts, have the power and the facilities to investigate and initiate action and, more or less informally, find the facts which under the law justify a course of action. They cannot and do not declare the law but perform the sole duty of ascertainment. (*Dominguez Land Corporation* vs. *Daugherty,* 196 Cal. 468, 483.) Under this theory the order of statewide agencies such as the Board of Optometry would not be subject to review in response to the writ of certiorari, but their discretion could be confined within legal limits either by the procedure heretofore suggested or by the use of the writ of mandamus.

Aside from the fact that the writ of prohibition will not lie, for the reasons already stated, we are of the opinion that the petitioner is not at this time entitled to any relief upon the showing made. He is accused of making untruthful statements, in this, that he advertised "for sale complete glasses containing single vision lenses and including frames and examinatiou for seven and 50/100 ($7.50) dollars," but "refused to sell" the same for that price "to persons answering that advertisement." No evidence was taken, this proceeding having been instituted before the time set for hearing. We can appreciate that under certain testimony it might be proven that the advertisement was not an untruthful statement, whereas, under other circumstances, it would be demonstrated to be untruthful and intentionally drawn to mislead. Certainly untruthful advertising should be held to constitute an untruthful statement. Under such circumstances the respondent board should be permitted to proceed.

Accordingly the judgment is reversed and the peremptory writ of prohibition is discharged.

THOMPSON, J.

We concur:
Decision unanimous.

MEDICAL JURISPRUDENCE†

By HARTLEY F. PEART, ESQ.
San Francisco

The Doctrine of Res Ipsa Loquitur (The Thing Speaks For Itself) as Applied to Malpractice Cases

Last month, in discussing the case of *Ales* vs. *Ryan,* the doctrine of *res ipsa loquitur* was mentioned, but discussion of the doctrine was deferred until this issue.

Ordinarily when a plaintiff commences action for damages arising out of an injury inflicted by the defendant to his person or property, it is necessary for the plaintiff to prove not only that the injury occurred and that he was damaged thereby, but that the injury ocurred as the direct result of a negligent act or omission by the defendant. Once in a while, however, an injury is caused in such a manner that the plaintiff, in the nature of things, cannot prove the defendant negligent as conveniently or as easily as the defendant, if, in fact not negligent, can prove the absence of negligence. In such situations the law helps out the plaintiff by invoking a doctrine known as *res ipsa loquitur,* or "the thing speaks for itself." When this doctrine is applied, the jury is entitled to *infer* from the fact that the injury occurred that it was caused by the negligence of the defendant. Practically speaking, in such cases it is up to the defendant to convince the jury that he was not negligent, while in ordinary cases the burden is upon the plaintiff to convince the jury that the defendant was negligent.

Before a court will instruct a jury that "the thing speaks for itself" it is necessary for each of the following factors to appear:

1. The instrumentality causing the accident must be under the exclusive control of the defendant and the injury must be caused by some act or omission incident to that control;

† Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, containing copy submitted by Hartley F. Peart, Esq., will contain excerpts from and syllabi of recent decisions and analyses of legal points and procedures of interest to the profession.

2. The accident must be of such nature that it ordinarily would not have occurred but for the defendant's negligence;
3. The accident must have occurred without any voluntary action or participation by the party injured; and
4. Information as to the cause of the accident must be more accessible to the defendant than to the plaintiff.

The case most often used to illustrate *res ipsa loquitur* is an English one where a barrel fell from the second story of a warehouse upon a person walking below. In that case the necessary factors were present, *i. e.*, (1) the defendant (owner of the warehouse) had exclusive control of the barrel which caused the accident; (2) ordinarily a barrel does not fall from a building unless it is negligently handled; (3) the pedestrian did not participate in any way in the barrel's fall; and (4) the precise cause of the barrel's fall could more readily be ascertained by the defendant than the plaintiff.

As expert evidence is *ordinarily* required to prove malpractice actions, it follows that *ordinarily* the *res ipsa loquitur* doctrine is inapplicable in such cases. In *Nicholas* vs. *Jacobson*, 113 Cal. App. 382, it is said:

> Ordinarily, negligence on the part of a physician or surgeon must be proved by expert evidence, and when the matter in issue is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive. Hence, when the expert evidence fails to show negligence on the part of the physician or surgeon, and there is no evidence of an independent act or omission within the common knowledge of laymen, there is no ground upon which the jury may base an inference of negligence, and in such a case a nonsuit is proper.

Now and then a case arises involving an allegation of negligence in professional practice, which is said by the Court to be of such a nature that expert or opinion evidence is not necessary to prove negligence. In these cases, even though a professional act or omission is involved, the courts have applied the doctrine of *res ipsa loquitur*. An early example of this type of case is the one where an x-ray machine, attached to a wall in a dentist's office, fell, striking a patient who was sitting in the dentist's chair. The patient suffered a broken nose and other injuries to her face. In that case the Court held that it was only necessary for the patient to prove the machine fell and what injuries were sustained in order to entitle her to recover against the dentist. This case bears quite a resemblance to the early English barrel case mentioned above. However, some of the more recent decisions applying "the thing speaks for itself" doctrine against physicians and other professional persons seem to be far removed from the original judicial conception of the meaning of *res ipsa loquitur*.

In *Armstrong* vs. *Wallace*, 8 Cal. App. (2d) 429, the District Court of Appeal applied the *res ipsa loquitur* doctrine in a sponge case. The surrounding circumstances disclosed that no sponge count was made by anyone and that the operating surgeon did not bother to ascertain if one had been made.

In the case which we discussed last month, *Ales* vs. *Ryan*, 93 Cal. Dec. 28, the California Supreme Court held that *res ipsa loquitur* was properly applicable in a sponge case where the surrounding circumstances disclosed that a sponge count was made but, through the mistake of the nurses the operating surgeon was misinformed with respect to the count. It further appeared in *Ales* vs. *Ryan* that the surgeon testified that he made an independent search for sponges after the count had been reported to him. This case represents a clear extension of the *res ipsa loquitur* doctrine to an entirely new class of cases. When one considers that one of the conditions which must be present before *res ipsa loquitur* is applicable, is "exclusive control of the defendant" over the instrumentality causing the accident, and when one considers that the operating surgeon does not have exclusive control over the sponges used in an operation, it is clear that *res ipsa loquitur* now apparently means much more than it has in the past.

One cannot venture to prophesy future decisions of courts upon this or any other subject, but, unless great caution is used by the courts in applying the doctrine of *res ipsa loquitur* to cases involving professional acts, it seems clear that a grave injustice will be done the members of the medical profession. Professional acts rarely are of such a nature that juries can draw upon "common knowledge" to determine the presence or absence of negligence.

SPECIAL ARTICLES

PROPOSED PUBLIC HEALTH LAWS*

For the information of readers who may be interested, the following excerpts from the "Senate Weekly History" and the "Assembly Weekly History," of dates of April 16, 1937, and showing the status of certain measures in one or both of the legislative houses, are here given.

I. Senate Bills

5—Crittenden, January 18. To Committee on Constitutional Amendment.

Proposed amendment to Article XI of the Constitution, by adding Section 21 thereto, relative to hospitals maintained by cities, counties, or cities and counties.

January 18—Introduced. To printer.

January 19—From printer.

April 1—From committee, with recommendation: Do not pass. Reported correctly engrossed.

* * *

121—Williams, January 14. To Committee on Insurance.

An Act to amend Section 100 of, and to add Section 122 to, the Insurance Code, and to add Chapter 14 to Part 2 of Division 2 of said code, providing for the regulation of insurance against the need for medical and hospital services, defining such services, providing standard provisions for such insurance maintenance of reserves for the protection of insureds under such insurance providing for the licensing of persons entering into such contracts and rendering such services and providing penalties for the violation thereof.

January 14—Read first time. To printer.

January 15—From printer. To committee.

* * *

605—McGovern, January 21. To Committee on Public Health and Quarantine.

An Act to add Chapter 11B to Part 2 of Division 2 of the Insurance Code, authorizing the creation, organization and government, and providing for the regulation of public associations to be known as medical service associations, defining medical service contracts, providing standard provisions for such contracts, providing for the deposit of security by medical service associations, providing for certificates of authority for associations entering into medical service contracts, and rendering through members medical services and providing for the powers and liabilities of medical service associations.

January 21—Read first time. To printer.

March 1—From printer. To committee.

March 31—From committee, with recommendation: Be amended, and re-referred to committee.

April 1—Read second time. Amended. To print, and re-referred to committee.

II. Assembly Bills

51—Heisinger, January 5. To Committee on County Government.

An Act to amend Section 4223 of the Political Code, relating to admission of county hospitals.

January 1—Read first time. To printer.

January 11—From printer. To committee.

* * *

684—Daley, January 18. To Committee on Public Health and Quarantine.

An Act to amend Section 5.190 of the School Code, relating to health and development certificates.

January 18—Read first time. To printer.

March 1—From printer. To committee.

* * *

1089—Beene, Cottrell, Boyle, Morgan, Turner, Welsh, Patterson, Cronin, Robertson, Dawson, Maloney, Clark, Peek, McMurray, and Hunt, January 20. To Committee on Medical and Dental Laws.

An Act to provide for the control, prevention, and cure of venereal diseases; providing for the establishment of a State Bureau of Venereal Diseases under the direction of the State Board of Health and defining its powers and duties; and providing for the granting of State financial aid for the control, prevention, and care of venereal diseases, and making an appropriation therefor.

January 20—Read first time. To printer.

January 21—From printer. To committee. Withdrawn from committee. Re-referred to Committee on Public Health and Quarantine.

March 15—From committee without recommendation, as amended.

March 16—Read second time. Amended. To printer.

March 17—From printer. To engrossment.

March 18—Reported correctly engrossed. Re-referred to Committee on Public Health and Quarantine.

April 6—From committee without recommendation, as amended. Read second time. Amended. To printer.

* See also editorial comments in this issue on page 294.